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**ATANAS SLAVOV**

**CHALLENGES TO CONSTITUTIONAL SUPREMACY  
IN A NEW DEMOCRACY:**

*A Critical Study of Bulgaria*

This research is primarily focused on the concept of constitutional supremacy and how it is implemented in the socio-political context of Bulgaria during the period of democratic transition beginning in 1989. The main problem is how the new democratic Constitution of 1991 functions in a society that generally lacks sustainable democratic tradition, although it made the political choice to follow the constitutional patterns of the Western constitutional democracies.

The research consists of three parts. Part one elaborates on the general ideas and concepts employed in the paper (constitutional supremacy, higher law, rule of law, constitutional democracy) giving their historical origin and theoretical background. Part two deals with the concept of constitutional supremacy within the Bulgarian historical and political context. It particularly focuses on the communist period, studying the changes within the communist system and the creation of the new *nomenklatura* elites which will play a decisive role during the democratic transition. Part three focuses on the challenges to constitutional supremacy raised during the years of democratic transition after the adoption of the new Constitution of 1991. Special attention is drawn to the challenges resulting from the preserved influence of the political and economic elites connected to the former communist *nomenklatura*, as well as to the new oligarchy-types of businesses and political organizations. Further, the challenges are studied in three dimensions – *normative* (built-in the constitutional text related to the insufficient implementation of the separation of powers and the checks and balances), *political-institutional* (the practices of influencing the political decision-making process on behalf of the parallel networks connected to former *nomenklatura* and the oligarchy),

*civic-sociological* (the general lack of independent civic actors limiting the governmental power and keeping public authorities accountable, as well as relying on the constitutional and legal system for achieving their goals). The legitimacy of the constitution is also reviewed in the context of its drafting, adoption, and performance.

### **METHODOLOGICAL NOTES**

With respect to the methodology, the underlying assumption of the research is that of the interdependence and mutual influence between the law and the social reality and of the transformative capacity and function of the modern law facing social reality. Furthermore, the widespread view of the law as “*superstructure*” over the “*real base*” of economics, politics, social relations, is not shared in the research, neither is the idea of the law as a *mere instrument* in the hands of the real social, political, economic actors. No doubt, to understand the place, form and the role of the legal regulator in the complex modern society it is important to study the social and political processes which take place in the society. Such analysis should consider the connections between the law and the social reality which are not one-sided, but often take the form of overlapping values, principles, beliefs among the different fields of politics, law, morals, tradition, etc. Multilevel and complex relations between law and society could be studied more successfully by an interdisciplinary and integrative approach which combines different research methods of the historical, the moral (higher law) and the political (sociological) schools of law.<sup>1</sup>

Regarding the study of the constitutional framework and the political institutions in a post-communist society, different methodological approaches could be employed. One of the most popular is that of explaining problems and insufficiencies of democratic transition relying solely on the explanatory role of the lasting *cultural legacies* (the lack of democratic tradition, the lack of receptivity to Western values, undeveloped institutional culture and poor legal consciousness leading to disrespect of the legal order and the authorities) or the enduring *popular psychological stereotypes* (passivity, fatalism, voluntary submission to the rulers, habits of dependency and unjustifiable patience, sense of worthlessness or lack of self-esteem, prevailing among the citizens). While recognizing that such approaches might be useful to some extent, they remain incomplete in explaining the complexity of the difficulties in establishing liberal constitutional order in post-communist societies. Rather, it is important in explaining the difficulties and challenges to focus

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Berman (2000), 289–310.

on the present problems, not only on the past. Thus, the main problem of the post-communist societies is *the present crisis of governability*. The problems in the legal system and the weak institutional performance do not depend solely on the cultural legacies (e.g. the traditional disrespect to law and order in a particular society due to its troubled past), but result from the general state weakness of the present (e.g. the failure of the law-enforcement agencies and agents to apply the law strictly, because of lack of incentives or poor legislation, insufficient funding, etc.).<sup>2</sup>

This latter approach is more pragmatic in searching for concrete remedies for the social problems. According to this view, if we do our best to fix legally the most pressing institutional problems (better laws adopted, clearer competences assigned, better funding provided, corrupted officials dismissed, investigated and sentenced) and still the weak performance continues, then it is justified to search for a more encompassing, richer and complex theory which may explain better the institutional failures. No doubt, such a more general and sophisticated theory should be rigorously empirically tested.

*THE CONCEPT OF THE CONSTITUTION SUPREMACY.  
CONSTITUTIONALISM, RULE OF LAW  
AND THE HIGHER LAW DOCTRINE*

The concept of constitutional supremacy is often interpreted in both substantive and formal sense. It relates to the concepts and ideas of constitution and constitutionalism, rule of law and higher law which will be employed in the research. Some brief remarks are important here. It is commonly agreed that *the constitution* provides the rules and procedures of exercising governmental power, and as a written form of the social compact, incorporates certain values and principles, which are considered to be its core. More importantly, the *modern constitution* is said to limit the arbitrary rule in order to protect what is considered to be the real foundation of the civil society – individual freedom and fundamental rights.<sup>3</sup> Further, the modern idea of constitutionalism embodies the philosophical and legal response to man's quest for political freedom, it comprises the values, principles, reasoning, institutional devices and procedures which shape the institutional framework by which the political freedom is secured<sup>4</sup>. Accordingly, the concepts of *constitutional democracy* and *constitutional government* are defined as “*a legal limitation on government... the antithesis of arbitrary rule*”, the government of law instead of the arbitrary will of men.<sup>5</sup> The same notions are expressed with the terms *limited*

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Holmes (1996), 22–77.

Wheare (1966), 1–13.

Preuss (1998), 618–621.

McIlwain (1958), 21.

government<sup>6</sup> and *the constitution of liberty*, which in Hayek's words is "a constitution that would protect the individual against all arbitrary coercion".<sup>7</sup>

Modern constitutionalism, based on the values of freedom, justice and tolerance in a pluralistic Western society, is linked both to the tradition of the rule of law, the common law system, the constitutional charters and conventions (England and its colonies) and to the process of adoption of the first written constitutions at the end of the 18<sup>th</sup> century (beginning with the state constitutions and the federal constitution of the United States). In the modern sense, constitutionalism often presupposes the concept of the supremacy of the written constitution. This concept could be explained in both *procedural* (by the raising of the ideas of national sovereignty and of the constituent power of the people), and *substantive* sense (i.e. constitutions are considered expression of the higher law in a positive legal form and also as social contracts which establish the fundamentals of the political and legal order, and providing safeguards for the basic values, principles and rights). The concept of constitutional supremacy plays an important role in elaborating the term "*dualist constitutional democracy*" ("dualist constitutionalism"), used by *Bruce Ackerman*. In short, "*dualist constitutional democracy*" embraces two ideas: *first*, it distinguishes the higher law of the constitution, enacted by "We, the people" from the ordinary law, adopted by the political majority in a given moment; *second*, it presupposes a genuine difference between the constituent power of the people and the constituted branches of government.<sup>8</sup>

Modern constitutions should be considered as instruments strengthening the democratic self-government, enabling people to preserve the conditions of political freedom, reducing the risks of irreversible mistakes and developing the capacity of self-correction and learning from past mistakes<sup>9</sup>. In the meantime, this should not lead to the simple majoritarian concept of democratic governance and should not erode the important achievements of the liberal constitutionalism (the rule of law, the system of checks and balances, the judicial review and the guarantees for individual liberty). In this sense, we do not need constitutions which are so democratic and open to frequent change, so that they fail to be the supreme laws of the land.<sup>10</sup>

The formation of the concept of constitutional supremacy and its defining features is necessarily interwoven with the gradual emergence and understanding of the concepts and principles of *the rule of law* and *the higher law*. Both concepts, closely associated with the Anglo-American constitutional history, have shaped the constitutional development in the West. It is necessary to mention, that both are closely related, and since the Middle Ages they have

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Friedrich (1974), 24–32.

Hayek (1978), 182.

Ackerman (1989), 453–547.

Holmes (1988), 195–240.

Sartori (1987), 321–336.

developed simultaneously becoming a distinguishable feature of the Anglo-Saxon legal tradition.

The emergence of the idea of the *rule of law* goes back to the processes in which the Anglo-Saxon and Norman customs and conventions were transformed into law in England, in the centuries after the Norman Conquest. In his book on the natural law concepts, *Charles Haines* explains the process in which the customary laws with no assignable beginning were accepted as rules without question and in the course of time acquired a character of inviolability. Whether this inviolability is the result or the cause of the preservation of these customs, the feeling has somehow come into existence that there is a law fundamental and unalterable, and rights derived from it indefeasible and inalienable. Although the content of the law may not be definite, the idea has remained in men's minds as a formative principle. The idea was accepted as a core concept in the developing common law system which led to the claim that even the Parliament is bound by the rules of the higher law.<sup>11</sup> More importantly, the higher law values, principles and standards have found their positive legal meaning within the common law system and thus have become legally binding to both the rulers and the citizens.

The evolution of the higher law ideas has resulted in elaborating the concept of the supremacy of law. Relying on the dominant idea of the mediaeval thinkers that the law should be supreme and superior to the state, the English judges played a decisive role in elaborating and deducing the distinguishable English doctrine of the supremacy of the law. The law was believed to be binding even to the king: the king was "*under God and the law*"; it was not the king that made the law, but the law that made the king. As the American legal historian *Harold Berman* points out, the emergence of the concept was supported by the prevailing religious ideology and by the belief that the fundamental law was itself divinely instituted. The prevailing political and economic weakness of the rulers and the pluralism of authorities and jurisdictions also contributed to the acceptance of the concept of the rule of law/supremacy of law. Moreover, the concept was supported by the high level of legal consciousness and legal sophistication which spread throughout the West in the 12<sup>th</sup> and 13<sup>th</sup> centuries. The concept was not only elaborated in the legal books and expressed with the abstract precepts of justice, equity, conscience and reason, but also found its practical meaning in the provisions of Magna Charta of 1215, Hungarian Golden Bull of 1222, Habeas Corpus Act of 1679, Bill of Rights of 1688, and in the common law precedents, legal customs and constitutional conventions alike.<sup>12</sup>

What is even more important, the concept has developed in a way which is decisive for the protection of personal liberties. It was conceived, that not

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Haines (1930), 29–32.

Berman (1983), 292–294.

only the abstract principles, but also the specific rules and legal procedures as *habeas corpus* and *due process of law*, play a crucial role in safeguarding individual freedom and limiting the exercise of governmental power.

Furthermore, one of the best concise definitions of the principle of *the rule of law* is given by *Albert Dicey*. According to it, the *rule of law* means, in the first place, the *absolute supremacy or predominance of regular law* as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Secondly, it means *equality before the law*, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Thus the “rule of law” in this sense excludes the idea of any exemption of public officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals. Lastly, the “rule of law”, may be used as a formula for expressing the fact that the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, *are not the source, but the consequence of the rights of individuals*, as defined and enforced by the courts. Thus, *the constitution is the result of the ordinary law of the land* and if the Habeas Corpus Act is suspended the Englishman would enjoy almost all the rights of citizens.<sup>13</sup>

A remarkable account of the link between the concepts of higher law and constitutional supremacy is given by the distinguished constitutional scholar *Edward Corwin*. In his famous essay “*The “Higher Law” Background of American Constitutional Law*”, Corwin finds the reasonable justification of the supremacy of the constitution in the values and principles of the *higher law* which are implicit in the constitutional provisions. He claims that the supremacy of the constitution is primarily grounded on intrinsic values such as justice and liberty, and lesser – on the will of the sovereign people. As Corwin eloquently put it: “The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional history. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice. *There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are... merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration*”.<sup>14</sup>

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Dicey (1964), 202–203.

Corwin (1955), 4–5.

However, the higher law values, principles and standards, should not be separated from the actual historic process of formation of the legal order in the Western societies and of the modern political systems. Thus the higher law concepts and the political institutions which are responsible for the maintaining of the legal order should be viewed in the light of their simultaneous historical evolution and interplay. It is an important feature of the law in the West, that during its evolution it acquired the meaning of being supreme over the political authorities and was considered as binding on the state itself.<sup>15</sup>

A distinguishable achievement of the last three centuries is the synthesis between the higher law concepts and the enforceability of positive law. Historically, the link between the higher law concepts and the positive law is made explicit first in the doctrine of *common law supremacy* (16<sup>th</sup> century in England) and then in the concept of *constitutional supremacy* elaborated in the end of 18<sup>th</sup> century with the adoption of the first written constitutions. This synthesis is recognizable in the substantive and procedural dimensions of the *rule of law* principle, as understood and enforced in the modern constitutional democracies.

There are important American contributions to the ideas of the higher law and the supremacy of the law. The Constitution of the United States was the first, recognizing the principle of constitutional supremacy (Art. 6 US Const.). Further, the introduction of judicial review provides remedy for the violation of the constitution and for the accountability of the legislative and the executive branch (U.S. Supreme Court decision *Marbury v. Madison*).<sup>16</sup>

A contemporary restatement of the principle of the supremacy of the constitution is given by the prominent German constitutionalist *Jutta Limbach*: "... there are three traits that primarily characterize the principle of supremacy of the constitution: 1. The possibility of distinguishing between constitutional and other laws; 2. the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and, 3. an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts."<sup>17</sup>

As numerous the theories of constitutional supremacy might be (grounded into the higher law concepts, the will of the people or the customs, beliefs and traditions of the community), the written constitutions of western liberal democracies provide certain institutions, procedures and mechanisms for their self-defence. Although, some of the most important safeguards are given not by the positive legal order, but rely on the predominant beliefs, conventions and customs in the society, which may support and enhance the liberal

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Berman (2000), 289–310.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 177

Limbach (2001)

constitutional order (as it is in the Anglo-American constitutional history) or may inhibit it (as in the former communist states).

## II. CONSTITUTIONAL SUPREMACY IN A CHANGING SOCIETY

The challenges to constitutional supremacy in a new democracy are intrinsically linked to the process of democratic transition – its successes and its deficiencies. It is important to note, that the Bulgarian constitutional history is not a gradual process and lacks the continuity in social and legal formation which is characteristic for the constitutional democracies in the West. During the last 130 years of modern Bulgarian statehood the most significant societal changes have happened as an outcome of rapid, almost revolutionary upheavals conducted in a violent way (e.g. the coups of 1923, 1934, 1944). As a result, most of that time the political regime was some sort of authoritarian or totalitarian, while democracy remained an exception in the national constitutional history. Nowadays, the last 20 years after 1989 have been the first viable attempt in organizing the society within the framework of the rule of law and constitutional democracy, although this democratization project is yet incomplete. A brief look at the recent past of the communist system in Bulgaria and the early years of democratic transition would provide important insights.

The way in which the social processes and the incomplete modernization of the Bulgarian society influenced the establishment of the communist regime, has been studied recently by the Bulgarian social scientist *Ivaylo Znepolski*. He describes the distinctive features of the Bulgarian communism with the term “*agraro-communism*”<sup>18</sup>. As the author points out, the communist rule in Bulgaria has produced certain paradoxes. Despite the official rhetoric of modernization and industrialization, the communist rule appeared as a continuation of the traditional society which it aimed to destroy. The Bulgarian Communism *de facto* made the principles, social conventions and practices of the agrarian culture official and guiding rules of social behaviour, which as such remained predominant during the regime. Moreover, the peasant class was instituted as *de facto* leading class within the party itself (because of the insufficient number of the proletariat), thus transforming the party from within, while the official Marxist propaganda remained on the surface. The result, claims *Znepolski*, was an odd synthesis: the mixture between the communist rhetoric of the official party line (on the forced industrialization and modernization) and the agrarian culture led to a peculiar Bulgarian variant of communism – the *agraro-communism*. This transformation had important consequences in the field of socio-political relations. The new predominant peasant culture, being elevated from the bottom of the social strata to the

18 Znepolski (2008), 147–167.

top of the ruling class, has made the traditional commitment to the organic community and the closed family-clan ties intricate parts of the institutional structure. This new dominant culture was hostile to civic values and liberal individualism. As a result, family-clan structure became a leading principle of grouping and organization in the new socialist society on both sides – the party *nomenklatura* and the ordinary people. Consequently, class struggle as a formal doctrine was in fact replaced by the rivalry among situational groups and clan interests, arbitrated by the communist party and its leaders, not by the market or by popular will.<sup>19</sup>

In the meantime, it should be pointed out, that the communist regime in Bulgaria, as well as in other Central and East European countries, has not remained static over the decades. It has slowly evolved to a regime type which was not fully identical to the early totalitarianism of the late 40s and the early 50s. The “new” regime type of the 60s and later on could be described with the term “*post-totalitarian regime*”, used by the prominent political scientist *Juan Linz*<sup>20</sup>. Some of the distinctive features of the post-totalitarianism could be found in four main areas: social pluralism, ideology, mobilization, and leadership. Thus, in contrast to the early totalitarianism, post-totalitarianism had much more degree of social and institutional *pluralism*, and in some forms of this regime different kinds of dissident sub-culture or “parallel culture” emerged in the society. Further, concerning the *ideology*, the post-totalitarian regimes retained the official dogma of the “leading role” of the communist party and the professional career remained highly dependent on the position one had in the party, but in contrast with the pure totalitarianism the ideology lost its enchantment in daily life and was unable to attract real mass commitment to the ideal. It continued to exist as a part of the conformist coping strategies. Another important dimension concerning the changing role of the ideology is the growing discrepancy between the official ideological claims and the reality. This discrepancy, which became obvious for the citizens in the 60s, helped in weakening the performance legitimacy of the regime and provoked critical questions on behalf of some party cadres and dissident groups. With respect to the *mobilization* of the population on the ideological basis, which the post-totalitarian regime has retained, there was an important difference. Despite the fact, that the official publicity and the forms of participation were reserved for the party, its members and the connected ideological associations, the mobilization of the citizens lost its intensity, and tended to generate more boredom than enthusiasm. Thus the routine mobilization of people within state-sponsored organizations was retained in order to achieve a minimum degree of conformity and compliance with the ideological and institutional structure of the regime. Concerning the *leadership* under the post-totalitarian regime, it is important to note, that the lead-

19 Ibid., 164–165.

20 Linz & Stepan (1996), 42–51; 235–254.

ers, although exclusively recruited among the party members, tended to be more bureaucratic and technocratic than charismatic. In addition, the post-totalitarian elite placed a growing emphasis on its personal security through ensuring the system of internal party checks on the top leadership by the party structures, procedures and the “internal democracy”.

Furthermore, the post-totalitarian regime type can be subdivided into three additional categories: “*early*”, “*frozen*”, and “*mature*” post-totalitarianism. As *Linz and Stepan* suggest, *early post-totalitarianism* is very close to the totalitarian ideal type, but differs in elaborating some constraints on the party leader. Bulgaria is considered as a typical example of this category almost until the end of 80s. The *frozen post-totalitarianism* is characterized with some tolerance to the critics of the regime, but nevertheless all the control mechanisms of the party state stay in place and do not evolve (e.g., Czechoslovakia, from 1977 to 1989). As to the *mature post-totalitarianism*, the society has experienced significant changes in all the dimensions except the leading role of the communist party (e.g., Hungary from 1982 to 1988).

It is important to analyze, where Bulgaria stood during the period with respect to the political and institutional forms of the regime. Following the criteria, laid down by *Linz and Stepan*, we can claim that the Bulgarian state and society in the late 80s approximated the early post-totalitarian type and remained one of the closest and unreformed in the region.<sup>21</sup> The economic reforms were hampered, the independent civil society groups were few and barely gaining support, the mechanisms of the secret services were strong enough to control and direct the government and the party in the chosen direction. As a result, the regime in Bulgaria was successful in initiating, planning and directing the political change which was obvious in the consequent events – the victory of the communist party on the first free elections held in June 1990, as well as the decisive role of the party in the adoption of the new constitution of 1991. Moreover, the party preserved a leading role in the government during the first year and a half after 1989, unlike other post-communist states (Hungary, Czechoslovakia, Poland, etc).

Unlike the other states in Central Europe, the democratic opposition in Bulgaria began to structure and unite in the late 1989 (forming the Union of Democratic Forces – UDF), although some dissident associations were established a year earlier, even if, in fact, they remained almost unknown to the wide public. It took some more months for the UDF to emerge as an effective opposition and to be presented on the Round Table talks which were dominated by the Communist Party and its experts. The lack of expertise and organizational experience within the UDF during the first months of its existence in the beginning of 1990 led to the favourable position of the Commu-

21 Linz & Stepan (1996), 333–343.

nists on the Round Table talks. As the Bulgarian scholars point out, unlike the Hungarian Round Table, where the democratic opposition first held an Opposition Round Table where it set out firm principles of further negotiation, in Bulgaria the preparatory meetings of the Round Table were coordinated by Andrey Lukanov, one of the Bulgarian Communist Party leaders of the coup, who “chaired all meetings, set up the agenda and led the discussions”.<sup>22</sup> Negotiating with the Communist Party, the democratic opposition succeeded in securing some basic liberal principles of the new-coming political system, laid down in the adopted Constitution of 1991. Nevertheless, the opposition lacked the organizational capacity to win the first free elections and to form the government and rule the country in the first years of the transition. Legitimized on the Round Table, former communists remained in power both in the constituent assembly and the government for a year and a half thus able to secure themselves an important influence in the economy and the politics of the newly established democratic country.

### III. CHALLENGES TO CONSTITUTIONAL SUPREMACY IN POST-COMMUNIST BULGARIA

The problem of challenges to constitutional supremacy is especially relevant in a post-communist society where the basic concepts of law, rights and constitutions were undermined or rejected under the previous regime. There are many factors – political, economic, social, cultural – which may lead to insufficiency and weak performance of the adopted constitutional model of parliamentary democracy. Although on the formal normative level the Constitution of 1991 embraces all main features of the Western European constitutionalism, on the performance level, the “living constitution” sharply diverges from the normative model. For the majority of the citizens the real constitution is that of fusion of powers and parallel/hidden decision-making bodies, clientelism, oligarchy, political corruption, etc. The common understanding of the problems of public governance and the maintaining of a just and effective legal order in the country is further strengthened by the critical reports of the EU Commission, reaffirmed by other international institutions (Council of Europe, OSCE) or transnational civil organizations (Transparency International, Human Rights Watch, Freedom House).

Before going into a deeper analysis, it is useful to point out the standards and criteria according to which the achievements and the fails of the Bulgarian constitutional system will be tested. These are the principles, criteria and standards of consolidated liberal democracy. The concept of consolidated democracy as a standard for evaluating the performance of the national constitutional model is taken from *Linz and Stepan*. In short, we have a consoli-

22 Kolarova & Dimitrov (1996), 178–213.

dated democracy, when in a given political system democracy has become “the only game in town”. The working definition of consolidated democracy includes some important characteristics. *Behaviourally*, a democratic regime is consolidated when the leading national, social, economic, political, or institutional actors do not spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state. *Attitudinally*, a democratic regime is consolidated when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for anti-system alternatives is quite small or more or less isolated from the pro-democratic forces. *Constitutionally*, a democratic regime is consolidated when governmental and nongovernmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process. In short, with consolidation, democracy becomes routinized and deeply internalized in social, institutional, and even psychological life, as well as in calculations for achieving success.

Furthermore, in order to become a consolidated democracy, within a given political system, five other interconnected and mutually reinforcing conditions must also exist. First, there should be conditions for the development of a *free and vibrant civil society*. Second, there must be a relatively *autonomous and valued political society*. Third, there must be *rule of law* to ensure legal guarantees for citizens’ freedoms, independent associational life and the principles, values and institutions of limited constitutional government. Fourth, there should be a state bureaucracy and institutional capacity that is usable by the new democratic government and ensures the *governability and predictability of the social and political processes*. Fifth, there must be an *institutionalized economic society*, understood as a set of socio-politically crafted and accepted norms, institutions, and regulations, which are useful in mediating between state and market.<sup>23</sup> These differentiations will be useful in defining the origin and the types of the challenges which facing the supremacy of the constitution.

### 1. *Defining the Challenges to the Constitutional Supremacy*

Using the integrative and multidisciplinary approach in defining the challenges to the constitutional supremacy, I suggest that the main challenges could be analyzed in three dimensions:

1. *Normative* – highlighting the normative deficiencies in the constitutional

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23 Linz & Stepan (1996), 5–15.

text leading to the inefficiency of the institutional framework and relations. The focus here is on the problems arising from the adopted model of separation of powers and the lack of proper mechanisms of checks and balances concerning the organization of the judicial branch. This dimension will be discussed in the light of the recent reports of the EU and the Council of Europe providing a critical examination and recommendations on restructuring the Bulgarian judicial system. Some attention will be drawn on the actual performance of the established constitutional model and how the deficiencies in its implementation hamper the social trust in the institutions.

2. *Political-institutional* – the challenges to constitutional supremacy will be examined in the light of the process of re-institutionalization of the old nomenklatura and the political and economic networks of the communist regime gaining both the economic and political power in the country despite the institutional reforms since 1989.
3. *Civic-sociological* – primarily focused on the hampered modernization of the Bulgarian society and the lack of sufficient number of active social actors (civic, economic, political) organizing themselves in effective networks pursuing their interests in accordance with the institutional patterns and the principles of the constitutional democracy.

*The overall context of interpretation* will take into account the social-political developments of the last two decades. However, the political order still guarantees a privileged position in the political and economic sphere of people and networks that are biographically connected to the former communist elite. Thus, what is considered to hamper in general the good performance of the new constitutional model, its basic principles and values, is the survival, mobilizing and returning into power of the political and economic elites linked to the former regime.

Some more light should be spread on these claims. New insightful analyses of the transition period, conducted by Bulgarian social, political and legal scholars, are published in the recent sociological book “*The Networks of Transition*”<sup>24</sup>. The book focuses on the role and ties of the *nomenklatura* and the communist secret services in the process of creation of the national business elite in the first transition years. Studying the archives of the Communist Party and the State Security, interviewing some leading actors in the process of economic transformations, the authors provide convincing evidence on their main hypotheses: of the decisive role of the party *nomenklatura* in that process. The authors reasonably argue that the first business structures in

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24 Chalakov & Hristov (2008).

capitalist form (foreign trade companies, banks, firms) were established under the control of the party in the 1980s thus ensuring a privileged position for these actors in the field of the national economy in the end of the regime and the first years of the transition. Furthermore, the party itself successfully remained in power almost two years in the beginning of the transition (1989–1991) thus being able to influence the process of political change and ensure the control over the redistribution of the national wealth among connected networks. The authors also highlight the role played in the transition processes by some of the powerful actors of the communist regime – Ognyan Doynov, Andrey Lukanov, Georgi Naydenov, Emil Kyulev, Atanas Tilev and many others, which were occupying both the highest party and the highest secret service offices, and were both politically and economically influential before and after the fall of the regime.<sup>25</sup> For instance, Ognyan Doynov, being a member of Politburo in the 80s, was the person who mainly designed and implemented the decision providing the legal form and procedure for the incorporation of the foreign trade companies of the communist party (in some Western European states) through which billions of dollars and national property were distributed to the high party officials and the new emerging business elite in Bulgaria (e.g. Multi Group holding, Throne, Teximbank, the Bank for Agricultural Credit – BZK, etc.)<sup>26</sup>.

The connections between the former party elite, secret services and the new political and business elites in the beginning of the democratic transition have developed and sophisticated during the next decade. Through the official recognition, by the international community and the EU, of the functioning of a democratic political system and of a free market economy in Bulgaria the established elites and their networks were further legitimized and strengthened. Nevertheless, under a closer and critical look what seems to be a democratic state on the surface reveals its structural and systematic defects. In 2008 the Bulgarian political analyst *Ognyan Minchev* commented on the close ties between the national government, the president and the oligarchy: “...*Oligarchs, more or less closer to the President Parvanov, rule the country behind the government...*”. Ognyan Minchev also added that the Bulgarian institutions are a façade for the hidden economic forces which control the processes in the country. “...*Whoever we appoint as a Chief Prosecutor or a Prime-minister, if the existing control of the oligarchy is preserved, no progress can be made...*”, continued Minchev. In his view, the Bulgarian transition is influenced by autonomous organized crime groups, which have developed under the protection of the communist *nomenklatura* to an oligarchy, which in a result controls the institutions and the process of decision-making. Minchev also

25 For further examination of the role of the secret services in the political and economic transformation, based on the detailed study of the party and secret services archives, see Metodiev (2008); Hristo Hristov (2008).

26 Nikolov (18/02/2000).

commented on the practices of vote trading which occurred in the last elections for local authorities (in 2007 and 2008). In conclusion, Minchev pointed out that the century old heritage of European elites obeying the principles and legal rules is contrary to the present day situation in Bulgaria where pseud-elites refuse to obey some important rules. Concerning the further integration of the country in the EU, Minchev suggested that the main challenge remains the completion of the modernization process in Bulgaria. This process should be conducted in two main stages – cultivation of modern political elite in the country, and by using its resources – completion of the modernization process.<sup>27</sup>

## *2. The Normative Deficiencies of the Constitution of 1991.*

Bulgarian and international constitutional scholars and experts share the view that the Constitution of 1991 incorporates the principles of rule of law (Art. 4 and 5), separation of powers (Art. 8), popular sovereignty (Art. 1), political pluralism (Art. 11), protection of the fundamental rights and freedoms in line with the internationally recognized standards (Chapter II). The Constitution also provides for the parliamentary form of government and guarantees against the arbitrary rule. However, during the first decade of its operation, the Constitution has revealed some deficiencies, mainly in the system of checks and balances among the three branches of government. The institutional balances between the President and the Council of Ministers, between the Parliament and the Council of Ministers, and the most debated, between the judicial branch and the other branches of government, have been hot issues in the political debate.

One possible explanation of the deficiencies of the constitutional text could be found in the way and the context in which the Constitution was drafted and adopted. It has been often pointed out, mostly by the Bulgarian constitutional scholars, that Bulgaria was the first post-communist country to adopt its new democratic constitution in July 1991. However, the process of adoption of the Constitution was neither smooth, nor consensual. But it was a rapid one – it took around four months to debate and vote on the new constitutional texts. This was due to the fact of the unequal representation in the Grand National Assembly of the former communists who had the majority and the democrats which were not unified in their views and expectations. During the voting of the Constitution, the former communists were supported by the moderate parties among the democratic opposition, while the most radical reformists from the UDF refused to collaborate and did not vote the new Constitution. An eloquent comment on the qualities of the new fundamental law, says that the new Constitution was drafted and adopted by people who had read much

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27 Minchev (25/06/2008).

about democracy and constitutionalism, but had never practiced and lived by their rules.<sup>28</sup> This has resulted in functional and structural deficiencies built-in in the constitutional text during its adoption. What evokes the most critical reports on behalf of the EU, the Council of Europe and growing disenchantment of Bulgarian citizens at large, is the constitutional organization and the procedural inefficiency of the Bulgarian judicial system. While we cannot claim that the main problems in the judicial branch are predominantly of constitutional or procedural nature, these foundations are nevertheless important preconditions for the good performance of the judicial system.<sup>29</sup>

Another problem, which should be properly addressed, is linked to the constitutional role and the functional relations of the President of the Republic in performing relevant constitutional competences. This is due to the fact that there is an indeterminacy concerning the constitutional status of the President either as a part of the executive branch or as a titular of a distinct *pouvoir neutre*, beside the three classical branches of government. While the problems within the judicial branch draw much more attention, the latter problem, because of its highly political dimension, does not attract much of the critical scholarly examination.

Concerning the problems of the judicial system, the recent report of the Venice Commission on the Bulgarian Constitution, openly criticizes some of the constitutional provisions, after the amendments in 2006 and 2007. These changes were aimed at fixing the organization of the Supreme Judicial Council, and the Chief Prosecutor's Office, and at limiting the attempts of the political branches to jeopardize judicial independence.<sup>30</sup>

The critical analysis of the Venice Commission experts on the current constitutional organization of the judicial branch could be summarized in five major points:

- The general criticism of the Commission is pointed at the insufficient constitutional guarantees for the judicial independence.
- The Commission experts recommend the election of the parliamentary quota (11 members) in the Supreme Judicial Council by a qualified majority of the votes in the Parliament. Thus a higher level of political consensus will be ensured and the ruling majority could not duplicate itself in the Judicial Council.
- Other critical remarks are directed to the new role of the Minister of Justice, provided for by the last constitutional amendments in 2006 and

28 Krastev (2006).

29 For an insightful socio-legal analysis of the deficiencies in the judicial branch in the context of the separation of powers and the procedural aspects of adjudication, see Hristov (2007), 9–51.

30 European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Bulgaria, Strasbourg, 31 March 2008.

2007. According to the Commission, the newly assigned competences of the Minister are very extensive and may compromise the independence of the judicial branch by giving the Minister undue power over the judicial branch because he or she both makes these key proposals and presides the Council that has to take a decision on that.

- Another commented issue is the joint participation in the Supreme Judicial Council of judges, prosecutors and investigators and their competence to decide about the career options or dismissal from office for each other. The recommendation is that appropriate specialized committees or chambers should deal with matters pertaining to the particular branches of the judicial system so as to ensure that there is no risk of influence by one branch towards the other.
- The Commission also comments on the long probationary period of 5 years required for gaining permanent position in the magistrate's office. The Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.

The real problems with the political influence over the judicial system which evoke the Commission's criticism could be illustrated by three separate elections within the judicial branch taking place in the last few years. First, the election of the new members of the Supreme Judicial Council on behalf of the parliamentary quota in 2007- the political parties forming the parliamentary majority elected all of the 11 members of the Council only among themselves. Second, the election of the inspectors in the Judicial Inspectorate in 2007, although following the constitutional requirement for a qualified majority of 2/3 of the votes, provided representation only for the members belonging to the then ruling three-party coalition. Third, the election of the Chief Prosecutor (in 2006) and the Chief Justice of the Supreme Court of Cassation (in 2007) formally followed the constitutionally established procedures, although the President of the Republic was directly involved in the selection process – two of his former legal secretaries were appointed to the highest offices in the judicial system. In all three cases the political branches of government could influence the work of the judicial system in a significant way and judicial independence could be compromised. It is not only the political dependence of the judiciary which contradicts accepted democratic standards, but also the high level of private economic influence over the work of the magistrates.

Another group of deficiencies built-in the constitutional system which cause tensions among the political branches of government, relate to the constitutional role and competence of the President of the Republic. According to the prevailing constitutional doctrine in Bulgaria, the President represents specific *pouvoir neutre* not being part of the classical three branches of government. The President has both independent and shared competences, with

an opportunity to influence significantly the political process in the country. According to the Constitution, the President is the Head of State, embodies the unity of the nation and represents the State in its international relations. The President enjoys a direct popular legitimacy as he is popularly elected for 5-years term in office. The Constitution itself is silent if the President is a distinctive titular of the executive power which allows a wide interpretation of the presidential competences and interrelations with other branches of the government. This ambiguity leaves open the question about the form of government in respect to the constitutional role assigned to the President. Although some scholars describe the constitutional form of government as *semi-parliamentarian* or *presidential-parliamentarian*, the majority supports the constitutionally defined “*a republic with a parliamentary form of government*”, while others define it as “*a hybrid form of parliamentary government*”. The political practice in Bulgaria, both in the beginning of the democratization and in the recent years, provides many examples of tensions between the President and the executive branch (the Council of Ministers) in reference to taking strategic political decisions in the fields of national security, national defence and international relations, where the competences are shared. In refusing to issue a decree on a certain governmental proposal, the President may block an important governmental initiatives or appointments. The direct popular legitimacy of the President empowers him to be politically active and to propose and lead political initiatives and campaigns which may overshadow these of the Prime-minister. This results in another point of tension between the President and the Council of Ministers. Furthermore, the presidential power to veto legislative acts adopted by the parliamentary majority has potential of creating conflicts among the political branches. Sometimes the tensions may evolve into bitter controversies even among fellow party members holding the offices of President and Prime-minister (*Zhelyu Zhelev*, President 1990–1997 v. *Philip Dimitrov*, Prime-minister 1991–1992; *Peter Stoyanov*, President, 1997–2002 v. *Ivan Kostov*, Prime-minister 1997–2001). Thus the institutional and personal tensions among the political branches of government further weaken the social trust in the democratic institutions.

Despite the highly critical remarks that have been made, the analysis should take into account the positive reports and statements presented by international institutions. As the Venice Commission report concludes: “*the provisions of the Constitution of the Republic of Bulgaria, including its recent amendments, are generally in conformity with European standards and in line with constitutional practice in other European states. The Constitution has provided a sound framework for the development of a democratic system in Bulgaria and this achievement has been internationally recognized by Bulgaria’s accession first to the Council of Europe and thereafter to the European Union.*”

The existing problems are caused not only by the quality of the regulative framework *per se*, but by a number of complex factors – the low level of social

and political development, the lack of civic self-organization and involvement which allow the parallel structures and networks to dominate the official decision-making process. The building elements and the social preconditions of the liberal political and legal order, beside the formal legal rules, are almost missing in the country, which determine the weak performance of the designed constitutional model.

### 3. *The Legitimacy of the Constitution in the Bulgarian Socio-political Context*

The correspondence between the constitutional promise of creating democratic political and legal order and the differing social reality is often considered as decisive in evaluating the legitimacy of the constitution. In order to clarify the way in which the Bulgarian constitution performs and to highlight the challenges it faces, it is important to look not only at the legal provisions, but most importantly, we need to concentrate on the performance of the constitution in the daily life of the society – how it serves the basic needs of the citizens. Facing the problem of performance, it is useful to give a brief account of some theoretical viewpoints on the concept of constitutional legitimacy.

The legitimacy of the constitution has been studied in different aspects. Some authors ground the constitutional legitimacy on the historical facts and events which have happened in a given moment – such as acquiring of state independence, gathering of a constituent assembly, direct approval of the constitution by popular referenda, etc. Other scholars, base the legitimacy of the constitution on the political achievements of the enlightened man (the Founding Fathers) who authored the constitution, while others emphasize the substantive constitutional content or the degree of acceptance and support which the constitutions receive on behalf of the citizens.<sup>31</sup>

Recent theories of constitutional legitimacy are developed by the American constitutional scholars *Frank Michelman* and *Jack Balkin*.<sup>32</sup> *Michelman* elaborates the concept of *respect-worthy constitution*. According to him, *legitimacy* means something more than merely legal validity in a positivist sense, and something less than complete justice. Rather, legitimacy indicates that the legal systems are *worthy of respect*, so that people living in legitimate legal systems have reasons to accept the use of state coercion to enforce laws that they do not necessarily agree with and may even think quite unjust. Therefore, legitimacy means *respect-worthiness*: even if the law doesn't conform to what we would like the law to be, and even if we lose when we attempt to change the law, we still respect the legal system as a whole and we accept the fact that it is permissible for the state to use its coercive power to require

31 A comprehensive summary of different aspects and theories of constitutional legitimacy: Friedrich (1974), 110–118.

32 Michelman (2003), 101–128; Balkin (2004), 485–509

people to abide by the law and work within the legal parameters of the system. Furthermore, explains *Michelman*, the legitimacy of the constitution is based not on its contractual nature, neither on its fixed substantive content, nor on the authority of the group of people who had agreed to it long ago. It is legitimate to the extent that the members of the political community, each interpreting its meaning and its content in his or her own way, can reasonably assent to it and give it their respect.

In defining the concept of constitutional legitimacy, *Frank Michelman* has found it useful to consider a number of different theories. One of the theories claims that the Constitution is legitimate because of the people who authored it (or ratified it). The second says that the constitution helps produce legitimacy because people just seem to accept it as an ongoing social practice. The third states that the constitutional order enjoys legitimacy because of its substantive content: the rights it recognizes, the procedures it offers for political decision-making, the limits on government action it imposes, and so on. The first two justifications *Michelman* calls “*content-independent*”, the third he calls “*content-based*”. The *content-independent* conceptions *Michelman* criticizes for not being in line with the liberal ideals of individual and collective self-government. Considering the *content-based justification* of legitimacy—the Constitution as a “contract for legitimacy” – it can be found tangible and sufficient at first glance. However, for being such a contract, the Constitution should be transparent (i.e., known to everyone in advance), and “publicly objective” (acceptable to all reasonable persons in a liberal society), but “*these publicity and transparency requirements cannot be satisfied, at least not without renegeing on a modern liberal commitment to take pluralism seriously.*”<sup>33</sup> In conclusion, he shares the view that if the constitution does contribute to the legitimacy of a liberal democracy, it is not because it is a legitimacy contract. Rather, it promotes legitimacy and respect-worthiness by being a common object of interpretation by different members of the political community.

Relying on *Michelman*’s main premises and conclusions, the Yale constitutional scholar *Jack Balkin*, further develops the interpretation of the concept of constitutional legitimacy. *Balkin* argues that despite the wide-spread view that the legitimacy of the constitutional system depends on the judiciary (the Constitutional court) having the final word on the meaning of the constitution, in fact the opposite is the case: constitutional legitimacy ultimately depends on disagreements about constitutional meanings, and the opportunity for individualistic approach to constitutional interpretation. The individualistic approach to constitutional interpretation, is crucial to producing a roughly democratic and responsive mechanism for critiquing and changing the constitutional/legal system. The legitimacy of the constitution evolves within the dialectical process of democratic responsiveness between individual citizens’

33 *Michelman* (2003),126–127.

views about the higher law and the way that higher law is recognized and enforced by legal officials. In Balkin's view, the dialectic between the central judicial authority and popular interpretations of the Constitution is crucial for the preservation of a legitimate constitutional system.<sup>34</sup>

The introduction to the main concepts of constitutional legitimacy is useful for the analysis of the Bulgarian constitutional context and the challenges to constitutional supremacy. Emphasizing the civic aspect of constitutional legitimacy – the popular acceptance of the constitution because of all the rights and benefits it guarantees (the concept of *respect-worthy constitution*) – is important in the study of its performance. Only a legitimate/ respect-worthy constitution should be obeyed as supreme law of the land and has the capacity to strengthen the social trust.

The legitimacy of the Constitution in the Bulgarian socio-political context will be “tested” according to the three main theories of legitimacy outlined by *Michelman*: as founded on its substantive content; as based on its authorship; or depending on the acceptance by the citizens as worthy of respect.

The review of the substantive content of the constitution leads to some important conclusions. Both the Bulgarian and international constitutional scholars have agreed that the Constitution of 1991 provides the institutional arrangements of the modern European constitutionalism and pays respect to the fundamental principles of rule of law, separation of powers, political pluralism, and protection of human rights. Thus the general assessment of the substantive content of the Constitution supports its legitimacy.

*The second criterion* which matters for the constitutional legitimacy is its *authorship*. Many constitutional scholars share the opinion, that the constitution is considered legitimate when the authority of the constitution-making power/ the constituent assembly is recognized by the people. Going back to the recent history of the begging of the democratic transition in Bulgaria may help in revealing the real actors and forces which have played a decisive role in the process of adoption of the new constitution.

The adoption of new democratic constitution was negotiated during the National Round Table talks in the first months of 1990. After the agreement reached by the former communist and the democratic opposition, the first free and democratic elections were held in June 1990. The former Communist party won the elections but the results were contested by the opposition. Nevertheless, the newly elected Grand National Assembly started its plenary sessions with the main goal of adopting new democratic constitution. The Grand National Assembly consisted of 400 members who represented the main democratic political families – socialists, social democrats, greens, lib-

34 Balkin (2004), 508–509.

erals, Christian democrats, conservatives; the Turkish ethnic minority party was also represented. The adoption of the new constitution, generally speaking, has happened under the conditions of a free public discourse, although the former communists have dominated the constitutional debates and have been better equipped with the legal and constitutional expertise. Nevertheless, some of the parties within UDF proposed constitutional projects which were debated by the constituent assembly along with the projects proposed by the majority<sup>35</sup>. The constitutional projects generally followed the internationally recognized democratic standards. During the debates, many hot issues have been addressed. One of the most debated was the vision of the state as more or less “social” which determines the scope and intensity of the state intervention in the economy and the life of the citizens. The Constitution was finally adopted by 309 out of 400 representatives, which was far beyond the required qualified majority of 2/3. However, the UDF representatives who advocated the rapid political and economic change, have refused to vote the final constitutional text, have left the Assembly and organized demonstrations against its adoption. Thus the Constitution of 1991 was adopted by the Socialist party, the Bulgarian agrarian union, the Turkish minority party and some liberal and green fractions of UDF. This failed participation of the democratic opposition in the adoption of the new constitution has created tensions in the national political debate for the next decade and has offered a basis for further questioning of the constitutional legitimacy. Nevertheless, in the next decade the Constitution of 1991 has proved to be a supreme law capable of instituting the democratic organization of the state and of producing the social consensus around the democratic constitutional principles. However, the new constitution has not yet guaranteed the quality of performance of the institutions. In conclusion, assessing the legitimacy on the basis of the authorship of the Constitution – its adoption by the popularly elected and internationally recognized constituent assembly – it meets the common democratic standards.

*The third criterion* for assessing the legitimacy of the constitution is its acceptance by the citizens as worth of respect and its capability of producing a democratic political and social order. This approach requires the use of wide interdisciplinary social and political analysis.

A closer look at the Bulgarian civil society reveals that the majority of the citizens share the democratic principles and values proclaimed in the constitution, or at least, there is no clear disagreement concerning those principles<sup>36</sup>. However, the majority of the citizens are highly critical to the performance of the democratic institutions – the three branches of government generally

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35 The total number of the constitutional projects was 15.

36 State of Society Survey 2008, Open Society Institute, Bulgaria.

lack the trust on behalf of the citizens because of their weak performance.<sup>37</sup> The active citizen involvement in the public processes remains relatively low. Civil participation in decision-making and during elections is also very limited. Although there is general support for constitutional democracy and democratic values and principles, the majority does not recognize the public institutions and the legal procedures as instruments and mechanisms for formal conflict resolution. Moreover, there is serious doubt among citizens about the institutional potential for policy formulation and implementation in pursuing the public interest and the common good. Some sociological surveys conducted in 2007 even strengthen the critical interpretation of the national political context. In the end of 2007, respondents were asked the question “*Do you consider Bulgaria to be a real democracy?*”. The results are indicative: only 8% of the respondents considered Bulgaria as real democratic country; another 19% viewed the country as only partly democratic; the impressive majority of 49% considered the country as a façade democracy, while 24% were convinced that the regime in the country is a hidden dictatorship.<sup>38</sup>

No doubt, the weak performance of the constitutional system relates to the increased social distrust in the overall institutional framework. Furthermore, some quantitative sociological surveys have drawn results which apparently express the declining trust in the national political institutions while revealing the lack of knowledge of the basics of the constitutional system and of the rights and responsibilities of the citizen in a democratic society. In 2008, the *National Centre for the Study of the Public Opinion* conducted a survey on the legal consciousness of the Bulgarian citizens. The total number of 1000 respondents across the country (in 86 cities, towns and villages) answered the question “*Have you read the Constitution?*”. The answer was indicative – only 22.4 % of the interviewed answered “Yes”, thus revealing a lack of knowledge among the majority about the fundamentals of the political system and their own place in it. Another question was “*Do you think the laws in Bulgaria are obeyed?*” – A greater majority of 83.5% answered with “No” (compared to the 1999 result, the number of the respondents which considered that the laws are not obeyed have increased with 12%). The respondents were also asked to specify their constitutional rights – 46% were unable to answer the question; only 18% pointed their right to vote, another 18% pointed the right to work, while only 14% mention the freedom of speech as a fundamental constitutional right. Some fundamental rights as freedom of religion, freedom of movement, freedom of assembly and of association were mentioned by less the 2% of the respondents. It is important to note that some social rights were better known by the citizens and the expectations for their protection by the state were higher compared to the most fundamental (first generation) of rights and freedoms. However, the vast majority of the respondents

37 Eurobarometer 70, Survey 2008. Eurobarometer 72, Autumn 2009.

38 Bajakov (2007).

being asked to formulate the main tasks of the law-governed state answered very rationally: the role of the state is to guarantee the obedience to the laws – 94%, to protect human rights – 94.8%, to protect the citizens against foreign aggression – 90%, to guarantee the public safety – 96%, to collect the revenue – 87%, to provide the general welfare of the population – 93%. Two more answers also deserve our attention: according to 88.5% of the respondents – the main role of the state is to guarantee the right to work of the citizens, for another 78% an important task of the government is the state regulation and intervention in the economy. The results of the survey reveal that Bulgarian citizens extensively rely on the government. After almost two decades of democratic transition and consolidation many people still expect the government to perform some interventionist measures in the economy securing jobs and income for the citizens. This goes along with the relatively low level of legal culture and consciousness. In the long run, the predominant place of the paternalistic expectations among the vast majority of the population combined with the general distrust in the legal system and the political institutions may lead to undermining the legitimacy and supremacy of the constitution and the constitutionally protected liberal-democratic values in the country.

Other surveys focused on the level of social trust in the national political institutions present similar results, which is problematic for a society claiming to be democratically consolidated. The *Eurobarometer 70* for 2008 presents one of the lowest levels of trust in the Bulgarian institutions<sup>39</sup>. According to the survey, the trust in the national parliament was only 8% (EU 27 medium – 34%), the trust in the government was measured at the levels of 15% (EU 27 medium – 34%), in the party system – 7% (EU 27 – 20%), while the trust in the judicial system is registered as one of the “highest” among the national institutions – 17% (EU 27 medium – 48%). Comparing the results with the rest of the EU member states and with the EU 27 medium, the levels of trust in the national institutions in Bulgaria remain one of the lowest. A year later, after the parliamentary elections in July 2009 a new centre-right government was elected. However, the results from the new *Eurobarometer 72* (Autumn 2009) are slightly different: 27% is the trust in the parliament; 17% – in the judicial system; 12% – in the party system. In the meantime, the registered trust in the EU institutions (58%) remains one of the highest among the other member states. In this respect, the symbolic capital of the EU membership and the trust in the EU institutions may be used by national politicians as a guiding force in the modernization of the Bulgarian society and in strengthening of the constitutional democracy, formally established with the Constitution of 1991.

39 Eurobarometer 70, Survey 2008.

The survey results, interpreted within the broader political and social context in Bulgaria, logically lead to the question: does that mean that the Bulgarian democracy, despite proclaimed “the end of transition”, is not yet completely consolidated or if consolidated, it is on a very low quality level that does not fulfil the expectations of the majority? The answer, although not final and definite, may be given by the political theory and the characteristics it attaches to the different types of democratic regimes. To recognize the failures of the democratic state and the persistent problems of governing one does not need to be a trained political scientist or constitutional scholar. As the common sense view on the consolidation problems states, the backsliding from the democratic politics and processes may happen at any time, although it would hardly occur in societies with continuous democratic growth over time, with rooted democratic traditions and a high level of institutional and social trust. Regarding the level of democratic consolidation, the political theory points out that unconsolidated democracies may be recognized by the existence of very strong and sustainable practices of clientelism, patrimonialism, corruption, parallel centres and networks of power, which replace or dominate over the official institutions. These unfair and undemocratic practices change the democratic regime into a façade, hiding the real nature of the political process<sup>40</sup>. As the case of Bulgaria makes evident, it is easy to find the existence of the peculiar kind of symbiosis between the new democratic institutions and elites and the former communist practices which emerged during the transition period.<sup>41</sup> These evaluations make the question on democratic consolidation more complex and hardly to be addressed in very clear and definite terms. However, this is also an answer – troubling enough, which should evoke and strengthen the vigilance and the responsibility of all critically thinking citizens, intellectuals and politicians who are concerned with the democratic progress of the country.

As it was pointed above, the discrepancy between the formally established constitutional rules and procedures, and the political practices, the economic and social relations, has become obvious for a greater majority of the citizens. In the long run, this could result in eroding the general trust in the liberal constitutional system and may increase the challenges to the legitimacy of the constitution. No doubt, the hampered modernization process of the Bulgarian society and the reluctant introduction of values, principles and traditions which have played formative role for the Western constitutional democracies also pre-determine the weak institutional performance and challenge the constitutional legitimacy.<sup>42</sup> Without underestimating the substantive content and the normative qualities of the constitution and the laws – very often decisive for the higher level of enforcement of the rules, this is not the only condition

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40 O'Donnell (1994), 55–69.

41 Bajakov (2007).

42 Hristov (2007), 79–82.

which matters (e.g., it is obvious in the cases with the failed implementation of a legal act with good normative quality). Nevertheless, for the majority of the citizens, it is easier to point at and criticize something visible and concrete like the constitution or a particular law, the politicians or the oligarchy, while failing to recognize the deeper social problems and processes shaping the Bulgarian society. To some extent, this attitude is a form of social escapism – as the citizens often fail to recognize their own responsibilities in maintaining the just political and social order and also lack the courage to live by the principles and rules of the open society. Consequently, the social “base” of the reformist political movements in the country remains a very limited one. If we admit, that this is the present social context in Bulgaria, then which are the social actors relying on the democratic rules and procedures to represent their values and interests? Moreover, on what “soil” the democratic system may be rooted before start growing and flourishing? All these questions present the rising challenges to the constitutional supremacy and legitimacy, although hardly may be answered in the present study.

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To restate what remains important for the research – the constitutional supremacy and legitimacy should be considered in the light of the substantive content of the constitution, the dominant public opinion on its performance, its ability of producing the social and institutional reality it promises, as well as the existing discrepancy between the constitutional model and the social reality. For the constitution to be a legitimate one, it is not only sufficient to be a good textual document, to be drafted by prominent politicians or intellectuals or to be adopted by qualified majority of the citizens. More importantly, it is necessary to be considered as respect-worthy on behalf of the citizens and to be implemented in the social processes. The Constitution of 1991 may be considered legitimate and supreme law of the land, only if it provides opportunities and procedures for broadening and deepening of the democratization and modernization processes resulting in higher quality of democratic consolidation. However, the responsibility for that and for its performance remains our own – as active citizens and civic community not only providing incentives to the politicians, but also keeping them accountable. Concluding the study, it may be persuasively claimed that the current socio-political context, the existing practices of acquiring and exercising the political power, the political elites partially dependent on the hidden networks of the oligarchy, the former secret services and the murky businesses, as well as the absence of critical majority of active citizens and civic organizations continue to challenge the viability the liberal constitutional order in Bulgaria. In a mid-term, this may lead to undermining the achievements of the process of democratic consolidation in the country.

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